memorandum

CC:TL
Br4:DICrosby

date: **24 APR 1986**

to: Assistant District Counsel, Dallas CC:DAL

from: Director, Tax Litigation Division CC:TL

subject: ███████████████████████

By memorandum dated January 30, 1986, you requested technical advice on the issue presented in the above-referenced case. We referred the case to Interpretative division (CC:I), which responded with O.M. 19996, I-020-86 (April 14, 1986) a copy of which is attached. In short, the O.M., with which we concur, agrees with your tentative conclusion in this case.

ISSUE

Does the filing of a completed Form 1040X following the filing of a Form 1040 that does not contain any information from which the tax may be computed start the running of the period of limitations under I.R.C. § 6501?

CONCLUSION

In the absence of fraud, the filing of a Form 1040X after filing a Form 1040 which does not amount to a return, controls the statute of limitations. The Service must act within the period of limitations of section 6501 (usually three years) from the date of the Form 1040X. The result would be the same if the taxpayer filed a proper Form 1040 rather than a Form 1040X.

FACTS

For the tax year ending ████████████████, the taxpayers filed a Form 1040 that did not contain sufficient data to calculate the taxpayers' tax liability for that year. Subsequently, the taxpayers filed a Form 1040X for the same year that did contain sufficient data to calculate the tax liability and that was properly executed under penalties of perjury.

ANALYSIS

Section 6001 states that every person liable for tax imposed by the Internal Revenue Code shall make such returns as the Secretary may from time to time prescribe. Under section

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6501(a) the taxes imposed by the Code shall be assessed within three years after the return is filed and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. In the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. Section 6501(c). The crux of the matter here is how long does the Service have to assess any tax due (absent fraud) for the year at issue.

It is well established that a Form 1040 that does not contain any information from which the tax liability may be computed is not a return under the Code; it is a nullity. See, e.g. <u>United States v. Porth</u>, 426 F.2d 519 (19th Cir. 1970). Under the facts of this case, the original Form 1040 filed by the taxpayers was not a return.

Although the taxpayers in this case should have used a Form 1040 in their subsequent filing (technically the Form 1040X had nothing to amend), the Form 1040X did contain sufficient information to calculate the tax liability. Moreover, it was signed under penalties of perjury, it purported to be a return and it appears that there was an honest and reasonable attempt to satisfy the requirements of the tax law. See <u>Beard v. Commissioner</u>, 82 T.C. 766 (1984), appeal filed (6th Cir. Sept. 24, 1984). Thus, the Form 1040X constituted a return and the statute of limitations on assessments will begin to run from the date it was filed. The O.M. distinguishes <u>Badaracco v. Commissioner</u>, 464 U.S. 386 (1984) involving fraudulent returns which the taxpayers therein attempted to replace with later-filed corrected returns. Although the taxpayer cannot purge the fraud in one return by voluntary disclosure in a later return, failure to file a return can be corrected by filing one.

Accordingly, it is concluded that the statute of limitations on assessment runs from the filing of the Form 1040X. The O.M. further concludes that the result would be the same if the taxpayer had filed a second (substantially complete and signed) Form 1040 rather than the Form 1040X.

This matter is assigned to Dianne Crosby of this Division, please call her at 566-3345 if you have any further questions.

ROBERT P. RUWE
Director

By: HENRY G. SALAMY
Chief, Branch No. 4
Tax Litigation Division

Attachment:
   O.M. 19996

DICrosby:dmp
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